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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LETICIA CARRASCO, Defendant and Appellant.	G048592 (Super. Ct. No. 09CF0090) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed as modified.

Janice M. Lagerlof, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Meagan J. Beale and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

Leticia Carrasco appeals from her conviction for first degree felony murder and second degree robbery. The trial court sentenced her to 25 years to life in prison for murder plus a concurrent three-year term for robbery. Carrasco contends: (1) the trial court erred by failing to instruct the jury sua sponte on the lesser offense of involuntary manslaughter committed during an attempted misdemeanor; (2) her statements to the police were obtained in violation of her *Miranda*[1] rights; and (3) the sentence for the robbery count must be stayed pursuant to Penal Code section 654. We find no merit to her first two contentions. The Attorney General concedes the sentence for robbery must be stayed, and we agree. Accordingly, we affirm the judgment as modified to stay Carrasco's conviction for robbery.

FACTS

Matias Vasquez was killed on December 22, 2008, and his body was found in the desert three weeks later. Juan Morales was Vasquez's friend. The two men worked together and would often go out socializing. On December 22, 2008, Morales received a telephone call from Vasquez asking if he wanted to drink beers at a local bar named "La Barca." Morales told Vasquez he could not join him because he was busy.

Vasquez's brother, Jose Vasquez (Jose), testified he last saw Vasquez the Friday before Christmas 2008. After that day, Jose sent many text messages to Vasquez, but the responses he received used words Vasquez typically did not use. Jose sent a final text message to Vasquez asking him to verify their mother's name. Jose received no response and reported Vasquez missing.

Orange Police Department Detective Phillip McMullin sent a text message to Vasquez's cell phone on January 5, 2009, asking if Vasquez was alright and received a response back. He sent another text identifying himself as law enforcement and received no response.

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1 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Orange Police Department Detective Joey Ramirez obtained records for Vasquez's cell phone, which showed over 100 contacts (calls and texts) beginning on December 23, from Vasquez's cell phone to a Las Vegas resident named Cheryl Madzelan. Madzelan was the girlfriend of Carrasco's son, Noel Carrasco (Noel). Madzelan eventually told Ramirez she had also received calls from Noel from a motel in the Anaheim area where he was staying with Carrasco. Those calls were traced to the Covered Wagon Motel in Buena Park.

Ramirez went to the Covered Wagon Motel and learned Carrasco and Noel had checked into room 27 on December 11, 2008. They left the motel on December 23 driving a black Honda, which they had difficulty driving. They did not pay the bill or check out. The bedspread, sheets, and the telephone cord were missing from the room. There were blood spatters all around the room, and Vasquez could not be excluded as a contributor to the DNA profile.

Madzelan testified Noel and Carrasco arrived at her house in Las Vegas on December 24, 2008. Noel was driving a black Honda. Carrasco stayed in the car, while Noel went inside and gave Madzelan two cell phones, which he asked her to charge. Madzelan's father gave them food and water for themselves and the dogs that were in the car with them, but Noel refused to open the trunk and had him put the supplies in the back seat of the car.

On January 12, 2009, Madzelan's father contacted the police and informed them that Noel was on the phone with his daughter. The call was traced, and Noel was located and arrested by Las Vegas police. On January 14, 2009, Carrasco was located and arrested at a residence in Las Vegas. A black Honda, which belonged to Vasquez, was in the driveway of the residence covered by a sheet.

Ramirez and McMullin interviewed Carrasco in Las Vegas beginning shortly after midnight on January 15, 2009. The transcript of the interview was read to the jury. Carrasco said she had no money and had been staying with her numerous dogs

in the garage of the residence of another one of her sons but had to leave. Carrasco and her son, Noel, checked into the Covered Wagon Motel, but neither of them had any money or work and faced eviction.

Carrasco told the police she met Vasquez on December 22 at La Barca. She went home with him. They had sex and he paid her $50 and took her back to the motel. Vasquez came back the next day, took her out for coffee, and proposed she have sex with him and another man (a friend of Vasquez's) for money. She refused, but when they returned to the motel parking lot, Vasquez's friend showed up. Vasquez got out of his car and his friend got in and pulled Carrasco into the back seat and forced her to have sex with him. Afterwards, the friend left her with the keys to Vasquez's car and drove away in his own car.

Carrasco said Vasquez returned after his friend left and insisted they go to her motel room to have sex. When they got in the room, he began undressing her. Noel came out of the bathroom and immediately began fighting with Vasquez. During the fight, Vasquez yelled he had money to pay. Carrasco said Vasquez pulled out a knife during the fight. Later in the interview, Carrasco admitted she and Noel had talked many times about finding someone to take money from. Carrasco said that as Noel and Vasquez fought, she told Noel to just take the money because they needed it. Eventually, Vasquez was knocked unconscious. Carrasco said she and Noel never thought about harming anyone and never thought it would happen. Carrasco said she and Noel just looked at Vasquez for a long time after the fight. His hand would move and Noel would tell him to wake up and tell her to wait to see if he would wake. When Vasquez did not wake up, they wrapped his body in sheets and a comforter. They tried to clean up the blood. They put Vasquez's body in his car but did not know how to drive it (it had a manual transmission), so Noel asked a passerby for assistance. They headed for Las Vegas, and when they got past Barstow, Noel pulled the body from the car and left it on a dirt road somewhere off the I-15.

Vasquez's body was found on January 15, 2009, off I-15 in the Barstow area. It was wrapped in a comforter and sheets, and trash bags with cords were tied around the feet and neck. There was no wallet, identification, watch, or cell phone. An autopsy revealed Vasquez suffered blunt force trauma, strangulation, and stab wounds. Blunt force trauma and strangulation were the causes of death.

Carrasco and Noel were charged with murder (Pen. Code, § 187, subd. (a))[2] (count 1), and robbery (§§ 211, 212.5, subd. (c)) (count 2). A special circumstance of murder occurring during the commission of a robbery was alleged (§ 190.2, subd. (a)(17)(A)). On the prosecutor's motion, the trial court severed the trials of Carrasco and Noel. A jury convicted Carrasco of first degree felony murder. The jury could not reach a verdict on the robbery-murder special circumstance allegation, and the court granted the prosecutor's motion to dismiss the allegation. The jury also convicted Carrasco of second degree robbery.[3] The trial court sentenced Carrasco to prison for 25 years to life for murder plus a concurrent middle term of three years for robbery.

DISCUSSION

I. No Sua Sponte Duty to Instruct on Involuntary Misdemeanor Manslaughter

Carrasco contends the trial court erred by failing to instruct sua sponte on involuntary misdemeanor manslaughter as a lesser included offense of murder. We find no error.

The trial court instructed the jury on first degree felony murder on the theory the killing took place during the commission of a robbery. It instructed the jury that even if Carrasco was not the actual killer, she could be found guilty of first degree

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2 All further statutory references are to the Penal Code.

3 Noel was convicted of first degree felony murder and robbery, and the jury found the robbery-murder special circumstance allegation true. The trial court sentenced him to life in prison without possibility of parole. Noel's conviction is the subject of a separate appeal (*People v. Carrasco*, No. G048458).

felony murder if she committed, attempted to commit, or aided and abetted the commission, of robbery. The court also instructed the jury the robbery special circumstance allegation could be found true only if the prosecution proved that even if Carrasco was not the actual killer, she intended to kill or acted with reckless indifference to human life. The defense did not request, and the trial court did not give, instructions on any lesser offenses to first degree felony murder. Defense counsel agreed that because the prosecution's exclusive theory of murder was felony-murder, there were no lesser included offense to the murder count. The court instructed the jury on second degree robbery. At defense counsel's request, the trial court instructed the jury on grand theft as a lesser included offense of robbery. Counsel argued the instruction was warranted because it was the defense theory that Carrasco's intent to take Vasquez's property did not arise until after he was mortally wounded.

On appeal, Carrasco contends her defense theory was she had not planned with Noel to bring Vasquez (or someone) to the motel room to be robbed. Her only intent in bringing Vasquez to the room was to have sex with him in exchange for money. Noel came out of the bathroom and began to fight with Vasquez and killed him. Carrasco argues there was evidence from which a jury could have concluded that regardless of Noel's intent to commit a robbery, she did not form the intent to take Vasquez's property until *after* the killing took place. She asserts that when she told Noel to "'just take the money'" while he was beating Vasquez, it was not to further Noel's robbery but to stop the assault. Thus, Carrasco contends it was apparent she was arguing her son killed Vasquez while Carrasco was attempting to commit an act of prostitution, which is a misdemeanor, and not while she was committing or aiding and abetting Noel in the commission of a robbery. Therefore, she claims the trial court had a sua sponte duty to instruct on involuntary misdemeanor manslaughter (based on the predicate offense of attempted prostitution) as a lesser included offense of felony murder (based on the predicate offense of robbery).

"[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support. . . ." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) The failure to instruct sua sponte on a lesser included offense in a noncapital case is not subject to reversal unless an examination of the entire record establishes a reasonable probability the error affected the outcome. (*Id.* at p. 165; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

"'Manslaughter is the unlawful killing of a human being without malice.' [Citation.] Involuntary manslaughter is manslaughter during 'the commission of an unlawful act, not amounting to a felony,' or during 'the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.' [Citation.] 'The offense of involuntary manslaughter requires proof that a human being was killed and that the killing was unlawful. [Citation.] A killing is "unlawful" if it occurs (1) during the commission of a misdemeanor inherently dangerous to human life, or (2) in the commission of an act ordinarily lawful but which involves a high risk of death or bodily harm, and which is done "without due caution or circumspection."' [Citation.]" (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1140 (*Murray*); § 192.)

The court was not obliged to instruct on involuntary misdemeanor manslaughter as a lesser included offense to felony murder.[4] "The misdemeanor

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[4] It is well established that involuntary manslaughter is a lesser included offense of murder predicated on *malice aforethought*. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145.) It is not at all clear that felony murder based on the predicate offense of robbery could have as a lesser included offense involuntary misdemeanor manslaughter based on a completely different predicate offense of prostitution. It would seem that at best under these circumstances the latter might be a lesser related offense, for which there is no sua sponte duty to instruct. (*People v. Lam* (2010) 184 Cal.App.4th 580, 583; *People v. Valentine* (2006) 143 Cal.App.4th 1383, 1387.) However, that point is not raised by the Attorney General, and we need not decide it in view of our conclusion the evidence would not have supported an instruction on involuntary misdemeanor manslaughter.

manslaughter clause of section 192 applies whenever the victim's death results from a misdemeanor that is 'dangerous to human life under the circumstances of its commission.' [Citation.]" (*Murray, supra,* 167 Cal.App.4th at p. 1143; see *People v. Cox* (2000) 23 Cal.4th 665, 676.) Criminal negligence is the mens rea standard. (*People v. Wells* (1996) 12 Cal.4th 979, 988 [misdemeanor causing death must be committed "'through criminal negligence'"]. """[C]riminal negligence"' exists when the defendant engages in conduct that is '"aggravated, culpable, gross, or reckless"'; i.e., conduct that is '"such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or in other words, a disregard of human life or an indifference to consequences."' . . . [C]riminal negligence exists 'when a [person] of ordinary prudence would foresee that the act would cause a high degree of risk of death or great bodily harm.'" (*People v. Butler* (2010) 187 Cal.App.4th 998, 1008.)

Carrasco has made no attempt at demonstrating her attempted prostitution[5] was dangerous to human life under the circumstances of its commission. Her contention is that she took Vasquez to her motel room to have sex with him for money—something she had done with him just the day before. Nothing about the contemplated prostitution suggested it was an act that would have a high risk of death or great bodily harm. What made the situation fatal was that her son then jumped out of the bathroom and attacked Vasquez to rob him, and his death was solely due to the robbery attempt.

Carrasco complains that because the jury was not given an instruction on the lesser offense of involuntary misdemeanor manslaughter, the jury was faced with an "all or nothing" situation and given no options if it had a reasonable doubt as to whether

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[5] Prostitution is defined as sexual intercourse and certain other lewd acts between persons for money or other consideration. (§ 647, subd. (b); *People v. Hill* (1980) 103 Cal.App.3d. 525, 534-535.)

she planned with her son to rob Vasquez. She relies on the rule that for felony murder the intent to commit the predicate felony, measured individually for each participant, must exist at the time of the killing, and if the particular defendant formed the intent to commit the felony only after the killing occurred, she is not guilty of felony murder. (See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1249-1250; *People v. Pulido* (1997) 15 Cal.4th 713, 723-724.) She relies on *People v. Anderson* (2006) 141 Cal.App.4th 430 (*Anderson*), for the proposition that under these circumstances, lesser included instructions should be given. *Anderson* does not aid her. In *Anderson*, defendant was tried on both felony murder and malice murder theories. Defendant was never charged with the predicate felony to support the felony murder theory, and the jury was never instructed on the predicate felony. The court held defendant was entitled to instructions on second degree murder and voluntary manslaughter. (*Id.* at p. 445.) Here, the prosecution, and Carrasco's first degree murder conviction, was solely based on the felony murder theory. "Where the evidence points indisputably to a killing committed in the perpetration of one of the felonies section 189 lists, the *only* guilty verdict a jury may return is first degree murder. [Citations.]" (*People v. Mendoza* (2000) 23 Cal.4th 896, 908.)

Furthermore, to the extent Carrasco contends an instruction on involuntary misdemeanor manslaughter would have given the jury an option if it believed her intent to take Vasquez's property did not arise until after Noel killed him, the error is harmless. "'[A] trial court's failure to instruct on a lesser included offense is not prejudicial if, as here, the jury necessarily resolved the factual question adversely to the defendant under other instructions [citations] . . . .'" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1155.) The jury was instructed as to the robbery count that Carrasco had to have the intent to take the property of another *before* or during the use of force or fear. The jury was instructed on grand theft as a lesser included offense of robbery, which required only that she intended to take Vasquez's property, and did not require any intent to use force or

fear. The jury found Carrasco guilty of robbery—rejecting the argument she did not have the requisite intent to rob Vasquez *before* or during the use of force and fear.

Carrasco suggests that a jury question during deliberations indicates it was struggling with whether she had the requisite intent for robbery. During deliberations, the jury asked about CALCRIM No. 1600's (robbery) statement that "[t]he defendant's intent to take the property must have been formed before or during the time she used force or fear. If the defendant did not form this required intent until after using the force or fear, then she did not commit robbery." The jury inquired, "How far in advance of taking of property or how close to the taking of property would define 'BEFORE' that is: does the intent have to be specific to this particular event/occurrence, or just in general?" The court replied there was no special meaning to the word "before," and instructed them to use the ordinary everyday meaning of the word. The jury then found Carrasco guilty of first degree felony murder and second degree robbery.

If anything the jury's question underscores the jury understood the intent to take the property must have been formed *before or during* the time force or fear was being used, and if the intent did not arise until *after* using force or fear Carrasco did not commit robbery. The jury's question was only as to how close in time *before* using force or fear, the intent to take had to occur. In finding Carrasco guilty of robbery, not grand theft, it necessarily rejected the contention Carrasco's intent to take Vasquez's property did not arise until after he had been beaten to death by her son. And in light of the jury's resolution of the robbery count, there is no reasonable probability it would have found Vasquez was killed during an attempted misdemeanor act of sex for money (i.e., prostitution), as opposed to occurring during commission of a robbery. Thus, the trial court's failure to give an involuntary misdemeanor manslaughter instruction was harmless.

II. No Miranda Violation

Carrasco contends the trial court erred by admitting evidence of her statements to police made during her interrogation because they were obtained in violation of her *Miranda* rights. We disagree.

We begin with relevant background from the pre-trial hearing on Carrasco's suppression motion. Following her arrest, Detectives McMullin and Ramirez interviewed Carrasco at the Las Vegas Police Department. Although Carrasco was in the interrogation room for six to seven hours, counsel agreed that with various breaks the officers interviewed Carrasco for two and one-half to three hours. The interview was conducted in Spanish primarily by McMullin, with Ramirez occasionally asking for clarification. The transcript from the interview, with English translation, was provided to the trial court.

At the beginning of the interview, McMullin recited for Carrasco her *Miranda* rights. He asked if she understood those rights, and she said she did. There was reference in the transcript to Carrasco signing a written advisement, but that document is not part of the record. McMullin asked Carrasco if she was willing to talk to the officers, and she said she was. McMullin began to question Carrasco, and she provided details as to her life circumstance (no money, nowhere to live) and how she came to be living with her son Noel at the motel. Carrasco explained she went dancing at La Barca with a friend, where she met Vasquez. She went home with him, and they had sex. He gave her money and took her back to the motel. Carrasco explained Vasquez returned the next day, took her out for donuts and coffee, and propositioned her to have sex with him and another man (Vasquez's friend) for money. Carrasco said that after she refused, the friend forced her to have sex in Vasquez's car. Carrasco began explaining how she and Vasquez then went back to the motel room to have sex for money and she made statements about the fight, and later disposing of Vasquez's body.

During an exchange in which McMullin and Ramirez were confronting Carrasco with information they had obtained from Noel that contradicted what she was telling them, Carrasco said, "It says right there that I can have an attorney right? That is not true what [inaudible] the things that you are saying there are not true." McMullin replied, "Which things ma'am?" Carrasco and McMullin continued a short exchange about Noel's statements, and the interrogation continued on from there.

Later in the interview,[6] during an exchange in which the officers were asking Carrasco to tell the truth, the following exchange took place:

"[McMullin]: Tell us what is true. (PAUSE.) If we're confused tell us, tell us what happened? Then? (Pause) [A]nd when you tell us we're not, not going to judge you and think that you're a bad person.

"[Carrasco]: I offered the [inaudible].

"[McMullin]: No. You're a mother who loves your children very much. Something happened that you didn't plan.

"[Carrasco]: I know that you're . . . it's your job.

"[McMullin]: Yes, that is true.

"[Carrasco]: And I've always liked watching your programs.

"[McMullin]: Yes.

"[Carrasco]: I know that . . . that there are many things that you have to do [inaudible].

"[McMullin]: What I say here are my words. (PAUSE.) And you know that we honestly care for you and for the other family if not why would I be here? I would be with my own family, but I care for you. I also care for them.

"[Carrasco]: I understand you.

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[6] The transcript of the interview with the interlineated English translation is 283-pages long. The first comment appears at the 88th page of the interview transcript; the second comment appears at the 173rd page.

"[McMullin]: Okay

(Pause)

"[Carrasco]: I know that I can remain silent and not say anything.

"[McMullin]: Yes because I already told you that.

"[Carrasco]: Not say anything.

"[McMullin]: Yes, but you feel something. A long time ago you could have not said anything and I know, like it is in the movies, in the end we're going to know the truth and you know how people feel afterwards, but it's difficult. You can remain silent, but that wouldn't be just to us. That's not how it should be.

"[Carrasco]: I know; I know that I can remain silent.

"[McMullin]: Yes.

"[Carrasco]: Not say anything, but it's something that can't be lived with.

"[McMullin]: No.

"[Carrasco]: Never in my life will I forget. (CRYING) To see my son and this other man, my son worried and desperate. (CRYING) Hugging me, crying, that he would yell at me saying he didn't want to do it.

"[McMullin]: No."

After the above exchange, Carrasco continued to answer the officers' questions. She eventually admitted she and Noel had previously discussed finding someone to take money from.

Carrasco moved to suppress her statements to the police. She argued she had not made a knowing and intelligent waiver of her rights, and that the officers' improperly continued to question her after she had attempted to invoke her right to counsel and her right to remain silent.

In denying the suppression motion, the trial court stated it had read the entire interview transcript and was construing statements in the context of the entire conversation. The court stated it was taking into consideration Carrasco's background,

experience, education, and ability to understand the recitation of her *Miranda* rights that was given. Although the court concluded Carrasco did not have a lot of experience in situations like this, she understood her rights. The court found the two exchanges between Carrasco and the officers demonstrated she knew and understood her rights. Referring to Carrasco's comment that came "sort of out of the blue" that, "'It says right there that I can have an attorney, right?[,]'" the court observed, "[s]o she remembered an hour and a half into the conversation what the officers had told her in their formal admonition." As to the later exchange about her right to remain silent, the court observed it again came out of the blue long after the initial admonition. Although it did appear Carrasco was struggling with what to do, she did in fact remember and understand what her rights were.

The court expressed concern about McMullin's response to Carrasco's statement she knew she had the right to remain silent that, "'You can remain silent but that wouldn't be just to us. That's not how it should be.'" Although the comment "at least raises the specter of a voluntariness issue," the court's concerns were alleviated by the fact McMullin's comment was immediately followed up by Carrasco again stating, "'I know. I know that I can remain silent[,]'" and acknowledging she knew she could, "'[n]ot say anything, but it's something that can't be lived with.'" The court found Carrasco's response indicated that although she was struggling with what to say, under the totality of the circumstances she understood her rights and her subsequent statements were voluntary and admissible. McMullin's statement did not render Carrasco's statements involuntary. In context of the entire interview, Carrasco's statements about her *Miranda* rights established she knew and understood her rights and her will was not overborne.

Carrasco contends statements made during her interrogation were inadmissible because they were not voluntary. Carrasco contends she did not make a

knowing and intelligent waiver of her *Miranda* rights, and the officers improperly ignored her attempts to invoke those rights and cut off further questioning.

"To protect the Fifth Amendment privilege against self-incrimination, a person undergoing a custodial interrogation must first be advised of his right to remain silent, to the presence of counsel, and to appointed counsel, if indigent. [Citation.] As long as the suspect knowingly and intelligently waives these rights, the police are free to interrogate him. [Citation.] However, if, at any point in the interview, the suspect invokes his rights, questioning must cease. [Citations.] Statements obtained in violation of these rules are inadmissible to prove guilt in a criminal case. [Citations.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 535 (*Stitely*).)

"[A]n express waiver is not required where a defendant's actions make clear that a waiver is intended. [Citations.]" (*People v. Whitson* (1998) 17 Cal.4th 229, 250 (*Whitson*).) "A suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights. [Citations.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 667-668.) "Although there is a threshold presumption against finding a waiver of *Miranda* rights [citation], ultimately the question becomes whether the *Miranda* waiver was knowing and intelligent under the totality of the circumstances surrounding the interrogation. [Citations.]" (*Id.* at p. 668.)

"In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda* . . . , the scope of our review is well established. 'We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained.' [Citations.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1032-1033.) "'Although we independently determine whether, from the undisputed facts and those

properly found by the trial court, the challenged statements were illegally obtained [citation], we "'give great weight to the considered conclusions' of a lower court that has previously reviewed the same evidence." [Citations.]'" (*Whitson, supra*, 17 Cal.4th at p. 248.)

We first consider Carrasco's contention she did not understand her rights and thus did not make a knowing and intelligent waiver. To the contrary, the record supports the trial court's finding she was properly advised of her rights and made a knowing and intelligent waiver. At the outset of the interview, McMullin gave the requisite *Miranda* advisement. He asked Carrasco if she understood her rights, and she said she did. She apparently also signed a written advisement of her rights, although the document itself is not in the record. After confirming with Carrasco that she understood her rights, McMullin asked Carrasco if she was willing to talk to the officers, and she said she was. Although he did not obtain from Carrasco an express waiver of her *Miranda* rights, such a waiver is implied under the circumstances.

We turn to Carrasco's contention her subsequent exchanges with McMullin in which she mentioned her rights to counsel and to remain silent demonstrated she either did not understand her rights, or was attempting to invoke them. At one point in the interview, after McMullin and Ramirez confronted Carrasco with information obtained from Noel, Carrasco said, "It says right there that I can have an attorney right? That is not true what [inaudible] the things that you are saying there are not true." McMullin replied, "Which things ma'am?" and the interview went on from there. Later, Carrasco stated she knew she had the right to remain silent and not say anything. McMullin confirmed she had that right. When he then suggested to Carrasco that remaining silent was not the right thing to do, she replied, "I know; I know that I can remain silent. . . . [¶] Not say anything, but it's something that can't be lived with." She then proceeded to answer further questions.

The trial court correctly concluded that rather than suggesting Carrasco did not understand her rights, her comments confirmed she did understand them. Moreover, the trial court did not err by concluding Carrasco was not invoking her rights but merely reiterating her understanding of them. "In order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect 'must unambiguously' assert his right to silence or counsel." (*Stitely*, *supra*, 35 Cal.4th at p. 535.) To determine whether there was an unambiguous assertion of the privilege after an initial waiver, we review the totality of the circumstances and the context of the words a defendant has used. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238.) Doing this, we employ an objective standard, that is, whether a reasonable police officer would have understood the defendant's statements to require immediate cessation of questioning. (*People v. Nelson* (2012) 53 Cal.4th 367, 376-378.)

Carrasco's statement, "It says right there that I can have an attorney right?" was not an unambiguous invocation of her right to counsel. Recently in *People v. McCurdy* (2014) 59 Cal.4th 1063, 1087 (*McCurdy*), our Supreme Court held a defendant's statement to the interviewing officer made "after acknowledging his *Miranda* rights, that '[t]hey always tell you get a lawyer' was [not] an invocation of his right to counsel . . . ." "A reasonable officer in these circumstances could have concluded that defendant was expressing the abstract idea an attorney might be in his best interest, but he did not actually request one. Although officers may seek clarification of an ambiguous request, they are not required to do so. [Citation.] Moreover, when [the officer] told defendant the officers could not advise him what to do, defendant continued to speak with them. Accordingly, defendant's further continuation of the conversation supports the conclusion that he did not intend his comment about getting a lawyer to be an invocation of his right to counsel." (*Ibid.*) Similarly, here Carrasco's comment she knew she had the right to a lawyer could reasonable be construed as an observation about her rights, not an invocation of them. Moreover, even were the statement construed as an

invocation of her right to counsel, the fact Carrasco immediately changed the subject and began further discussing the case with the officers constituted a further waiver of that right. (See *McCurdy, supra,* 59 Cal.4th at p. 1085 [defendant's reinitiation of generalized discussion about the case with the interviewing officer after invoking right to counsel implied waiver].)

Similarly, the trial court correctly concluded Carrasco's later statements that she knew she had the right to remain silent and not say anything—"I know; I know that I can remain silent. . . . [¶] Not say anything, but it's something that can't be lived with[]"—was not an unambiguous invocation of her right to remain silent but rather an indication she was struggling with what to say. Courts presented with ambiguous statements concerning the right to remain silent have held the right was not being invoked. For example, in *Williams, supra,* 49 Cal.4th at page 434, defendant's statement, "'I don't want to talk about it'" was not an invocation of the right to remain silent but rather an expression of frustration with the officer's repeated refusal to accept his denials. (See also *People v. Wash* (1993) 6 Cal.4th 215, 237-239 ["'I don't know if I wanna talk anymore'" not an invocation of right]; *People v. Jennings* (1988) 46 Cal.3d 963, 977-979 ["'I'm not going to talk . . . [t]hat's it'" and "'I shut up'" not an invocation of right but rather "only momentary frustration and animosity" towards one of the questioning officers]; *People v. Silva* (1988) 45 Cal.3d 604, 629-630 ["'I really don't want to talk about that'" not an invocation of right but desire not to talk about whether he was driving]; *People v. Castille* (2003) 108 Cal.App.4th 469, 488-489 [defendant's statement, "I can't talk no more," was not an invocation of the right to silence even though defendant was crying and struggling to speak].)

Finally, we cannot agree with Carrasco that other circumstances compel a conclusion her will was overborne making her statements involuntary. She relies on the facts the interrogation took place at night, she was in the interrogation room for seven hours, she was inexperienced with the criminal justice system, she was very

emotional during the interview, and the officers were sometimes aggressive in questioning her and accused her of not being truthful. Although these are factors to be considered in assessing whether a confession was voluntary or coerced, we cannot say this was an involuntary confession. (See *People v. Duff* (2014) 58 Cal.4th 527, 555-556, 558 ["we consider the totality of the circumstances, including '"'the crucial element of police coercion,'"' the length, location, and continuity of the interrogation, and the defendant's maturity, education, and physical and mental health"].) We have read the entire transcript of the interview and cannot say it was the product of "'those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.' [Citation.]" (*People v. Jones* (1998) 17 Cal.4th 279, 297-298.)

Here, although Carrasco was in the interview room for about seven hours, there were numerous breaks in which Carrasco was offered food, water, and bathroom breaks, and the questioning itself lasted less than three hours. (See *People v. Carrington* (2009) 47 Cal.4th 145, 175 [under the totality of the circumstances, questioning that continued over eight hours did not render a confession involuntary].) Although the officers pressed Carrasco to be truthful with them, general exhortations to a suspect to tell the truth are permissible. (*People v. Tully* (2012) 54 Cal.4th 952, 993.) During the interview, there were no implied threats or promises. After considering the totality of the circumstances in this case, we conclude Carrasco's statement to the police officers was voluntary and there was no error in introducing that statement at her trial. (*Williams, supra,* 16 Cal.4th at p. 660.)

III. Section 654

Carrasco argues, and the Attorney General agrees, that because she was convicted of first degree felony robbery-murder, the trial court should have stayed her sentence on count 2 (robbery), rather than imposing a concurrent term. We agree. Section 654, subdivision (a), provides in part: "An act or omission that is punishable in

different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." When a defendant is convicted on a felony murder theory, section 654 precludes imposition of a separate term for the predicate felony. (*People v. Montes* (2014) 58 Cal.4th 809, 898; see also *People v. Meredith* (1981) 29 Cal.3d 682, 696 [conviction of, but not punishment for, both felony murder and the related robbery proper]; *People v. Boyd* (1990) 222 Cal.App.3d 541, 575-576 [robbery sentence stayed under § 654 where robbery was crime underlying first degree felony murder conviction].) Accordingly, the sentence imposed as to count 2 (robbery) must be stayed.

DISPOSITION

The judgment is modified to stay the sentence imposed on count 2 (robbery). As modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting these modifications and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation, Division of Adult Operations.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.